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Nos. 04-1244, 04-1352

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, ET AL.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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Amicus Brief of Life Legal Defense Foundation In Support of Petitioners

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Interest Of Amicus[1]

Amicus Life Legal Defense Foundation (LLDF) is a California non-profit corporation which provides legal assistance to pro-life advocates. LLDF was established in 1989, when massive arrests of pro-life advocates engaging in non-violent civil disobedience (often called "rescues") created the need for attorney services to assist those facing criminal prosecution. Most of these prosecutions resulted in convictions under state law for trespass or blocking, sentences consisting of fines, jail time, or community service, and stern lectures from judges about the necessity of protesting within the boundaries of the law.

By the early 1990's, most of these pro-life advocates had turned to other, entirely lawful means of preventing abortions, including assisting women in crisis pregnancies, counseling women outside abortion facilities, and picketing, leafleting, and praying at schools, colleges, and other appropriate locations, including abortion facilities. Rather than applauding this conversion to entirely lawful forms of pro-life activism, abortion supporters have almost uniformly refused to acknowledge that there is essentially any difference between the rescue blockades of the late '80's and the completely lawful protest of the '90's to the present. They consider both to be unlawful interference with, and harassment of, women seeking abortions. The only difference is that the civil disobedience of the '80's occurred only sporadically, whereas sidewalk counselors and picketers appear weekly, sometimes daily—and the police will not arrest these pro-life activists because their conduct is lawful. For that reason, abortion providers have increasingly sought injunctions against pro-life picketers as a way of limiting protests.

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[1] This brief was not written in whole or in part by counsel for a party. No one other than amicus Life Legal Defense Foundation made any monetary contribution to its preparation. Written consent of the parties to the filing of amicus briefs have been filed with the clerk.

Unfortunately, in many cases, limitations on their First Amendment rights are not all that pro-life activists have to fear in actions for injunctive relief. Frequently, abortion providers seek attorney fees that may be available either under statutes such as RICO (18 U.S.C. § 1964) and FACE (18 U.S.C. § 248), or pursuant to state private attorney general statutes, such as California Code of Civil Procedure § 1021.5. See, e.g., *Feminist Women's Health Center v. Blythe*, 32 Cal. App. 4th 1641 (1995), cert. denied 516 U.S. 987 (upholding award of attorney fees to clinic against pro-life picketers); *Planned Parenthood Association of Santa Barbara, Ventura, and San Luis Obispo Counties v. Aakhus*, 14 Cal. App. 4th 162 (1993) (same). These provisions chill pro-lifers not only in their expressive activities, but in their defense of those activities in the courts.

Amicus LLDF is very concerned about the abuse of injunctive relief both as an end (chilling or stifling free speech rights) and a means (to attorney fees.) The Seventh Circuit's mandate directing the district court to determine whether four unspecified acts or threats of violence committed over a dozen years ago "are sufficient" to support an injunction, and prevailing party status for respondents, is just the sort of misguided approach to injunctive relief that has made the courts into the enemy, rather than the guardian, of free speech rights.

Summary of Argument

The Seventh Circuit's mandate makes one thing perfectly clear: the court is determined to give respondents one more chance to achieve some measure of victory in this litigation. In pursuit of this goal, the court not only engaged in a tortuous reading of the Hobbs Act, 18 U.S.C. § 1951, as discussed at length in the parties' brief, but also has issued mandates that defy both logic and law. The Seventh Circuit has remanded the case to the district court for a backwards

exercise of its equity jurisdiction, governed by conflicting commands, that can only result in an impermissibly vague injunction.

I. The Mandate of the Seventh Circuit Is Nonsensical

In remanding this matter to the district court, the Seventh Circuit was quite explicit in its instructions as to the order in which the court is to address the remaining issues: the district court is *first* to determine whether the four unspecified acts or threats of violence found by the jury are sufficient to support some form of injunctive relief. Then, "[i]f and only if the district court concludes that some form of injunctive relief would be justified based on the four remaining acts found by the jury, that court will have to confront a more complex legal issue, namely, whether the acts or threats of violence language in the Hobbs Act may serve as an independent predicate act under RICO." OR Pet. App. at 8a.[2]

This approach is topsy-turvy. It is as if a case were remanded first to determine what sentence the defendant should receive and then to determine if a crime has been committed, or first to determine if the plaintiff should recover damages and then to determine if the elements of the tort had been proved.

Particularly in the context of injunctive relief under RICO, this approach is nonsensical. Assuming *arguendo* that injunctive relief under RICO is available to private litigants, the equity jurisdiction afforded to district courts under RICO is nonetheless limited by an express statement of purpose: "to prevent and restrain violations of section 1962." 18 U.S.C. § 1964(a). Section 1962 prohibits conduct otherwise not criminal in and of itself, e.g., the investment of income derived from racketeering activity for the purpose of acquiring an interest in, establishing, or operat-

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[2] All citations to the Petition Appendix (OR Pet. App.) are to the pertinent documents in No. 04-1352.

ing any enterprise (18 U.S.C. § 1962(a)), the acquisition of an interest in or control of an enterprise through a pattern of racketeering activity (18 U.S.C. § 1962(b)); the conduct of an enterprise's affairs through a pattern of racketeering activity (18 U.S.C. § 1962(c)); or the conspiracy to violate any of the foregoing provisions (18 U.S.C. § 1962(d)). The commission of miscellaneous crimes—even the predicate offenses that may give rise to a "pattern of racketeering activity"—is not prohibited by RICO since these offenses are crimes in themselves.

Hence, a district court's authority to issue injunctive relief under RICO is limited to the prevention of RICO violations, i.e., violations of section 1962.[3] Injunctive relief is not authorized under RICO merely to prevent the commission of predicate offenses, particularly predicate offenses that are crimes punishable under state law. Thus the examples Congress expressly delineated in section 1964(a) as appropriate injunctions under RICO include:

> ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

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[3] See, e.g., *U.S. v. Private Sanitation Industry Ass'n of Nassau/Suffolk, Inc.*, 995 F.2d 375 (2d Cir. 1993) (enjoining defendant from participating directly or indirectly in carting industry and associating with co-defendants or known members and associates of organized crime for any commercial purpose was within scope of RICO's civil remedies.); *U.S. v. Local 30, United Slate, Tile and Composition Roofers*, 871 F.2d 401 (3d Cir. 1989), cert. denied, 493 U.S. 953 (1990) (individual defendants enjoined from participating in union's affairs and continuing to be employed in construction industry within union's jurisdiction).

In contrast to these explicit proscriptions on activities directly related to operating a racketeering enterprise, the Seventh Circuit seems to envision the district court conducting an inquiry into whether four unspecified acts or threats of violence could justify "some form of injunctive relief," unmoored from any specific statutory authority for the exercise of its equity jurisdiction. Only after it has determined if "some form of injunctive relief" is justified, need the district court determine if it can squeeze the injunction into the RICO box by finding the acts to be RICO predicates.

In sum, the Seventh Circuit's mandate directs the lower court to consider entering an injunction that exceeds its jurisdiction.

II. The Mandate of the Seventh Circuit Is Contradictory

In its original mandate of February 26, 2004, the Seventh Circuit remanded the case to the district court to determine whether the four unspecified acts or threats of violence "are sufficient to support *the nationwide injunction it imposed.*" OR Pet. App. at 30a (emphasis added). This limitation was reinforced where the court noted that the district court "may conclude that the proper interpretation of § 1951(a) is immaterial, if it decides that the four acts or threats of physical violence found by the jury are not sufficient alone to support *the nationwide injunction.*" OR Pet. App. at 31a (emphasis added).

However, in its order of January 28, 2005, after further briefing by petitioners showed the unlikelihood of the four acts supporting the nationwide injunction, the Seventh Circuit *sub silentio* altered its mandate, holding, "The only remaining question, to repeat, is *whether a different injunction*, tailored to the violations found, would be appropriate." OR Pet. App. at 7a. But later in the same opinion, it seemed to allow for either the same *or* a different injunction: "The

only remaining question is whether *any injunction* is appropriate. . . ." OR Pet. App. at 17a (emphasis added).

The Seventh Circuit is also unclear as to the scope of the district court's inquiry. In elaborating on how the district court is to determine the necessity of injunctive relief, the Seventh Circuit admonished: "This is not, however, an invitation either to the court or to the parties to reopen the record. If there is anything at all that is to be done, it must be based on the record that has already been built." OR Pet. App. at 7a–8a.

However, in discussing the same issue in the concluding paragraph, the Seventh Circuit notes that the Freedom of Access to Clinic Entrances Act "has now been in effect for five more years since the district court first considered the necessity of a nationwide injunction, and experience may require a reassessment of the Act's impact." OR Pet. App. at 16a. The Seventh Circuit's musing about more recent "experience" is, in fact, "an invitation . . . to reopen the record." How can the court reassess the experience with the Act's impact if not by engaging in another round of evidentiary hearings?

The conflicting directions given to the district court reveal the Seventh Circuit's own failure to grasp what it wants the lower court to do, other than give the respondents one more chance.

III. Any Injunction Issued Pursuant to the Seventh Circuit's Mandate Would Be Impermissibly Broad and Imprecise

In directing the district court to determine whether injunctive relief is appropriate, the Seventh Circuit noted, "It is not even clear whether the acts of violence were sufficiently well defined to justify any injunctive relief." OR Pet. App. at 7a.

To call this an understatement is itself an understatement.

Over the course of a seven-week trial, involving dozens of witnesses and hundreds of exhibits, Respondents argued that Petitioners and "hundreds or thousands of co-conspirators"[4] were responsible for dozens of acts or threats of violence, along with hundreds of other alleged criminal acts. These alleged acts or threats of violence ranged from kicking cars to making threats on radio programs to destroying medical equipment to shoving patients or clinic employees to leaving statements on a hotline number to entering a clinic and making remarks about "casing the place."

Out of this morass of evidence, the jury found that some defendant(s), or some person(s) associated with defendant PLAN, had committed four "acts or threats of physical violence to person or property." OR Pet. App. at 143a. No further specification of those acts is available to the district court.

Because the district court has no way of knowing which particular acts or threats the jury found, much less who committed them or where or when, any injunction to "redress" these acts could only be couched in the most general terms. Indeed, as all the court knows is that these were acts or threats of physical violence to persons or property in the context of this proceeding, the most narrowly tailored injunction it could impose would prohibit the petitioners from committing acts or threats of violence against the persons or property of respondents or their employees or clients.[5]

Such an injunction would clearly not comply with Federal Rule of Civil Procedure 65, which requires that every

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[4] Plaintiff's Amended RICO Case Statement, S. App. 378, 381.

[5] Indeed, this is how the district court dealt with the unspecified acts or threats of violence in its order of July 6, 1999, imposing a nationwide injunction. That order prohibits "damaging, destroying, or stealing property of" or "using violence or threat of violence against" any Plaintiff Clinic or any of its employees, volunteers, or clients. OR Pet. App. at 93a. In effect, the district court simply divided violence against property and violence against persons into two different provisions.

injunction "be specific in its terms" and "describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." Rather than being specific, an injunction against acts or threats of violence is more akin to the cry of an exasperated parent: "Whatever you kids are doing out there, cut it out!" While such an admonition may be effective in certain contexts, it hardly satisfies the requirements of due process, particularly given the wide array of conduct and speech that respondents claim constitutes acts or threats of violence.

Such a vague injunction, particularly the provision concerning "threats" of violence, would also be a powerful weapon in respondents' hand to chill the petitioners' advocacy. It would effectively turn over prosecution of petitioners for a vast array of criminal statutes to private parties—private parties ideologically opposed to respondents who will have every incentive to threaten or bring contempt proceedings for claimed violations.

Conclusion

There is a reason the Seventh Circuit's mandate is so illogical and far-fetched. It can be summed up in two words: attorney fees. The reality of the court's mandate is that it has nothing to do with injunctive relief for the respondents. No one would seriously contend that the respondents will sleep more soundly if the district court enjoins Joe Scheidler and Tim Murphy and Andrew Scholberg from committing acts of violence against them, i.e., acts already stringently punishable as crimes.

In truth, the "relief" sought by the respondents, which the Seventh Circuit is loathe to deny them, is simply prevailing party status, and with that, the right to collect millions of dollars in attorney fees. For the sake of giving respondents one last (?) chance at an award of fees, the

Seventh Circuit has defied this Court's mandate putting an end to this litigation.

The judgment of the Seventh Circuit should be reversed.

Respectfully submitted,

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